RECENT CASES.

ABATEMENT AND REVIVAL — SURVIVAL OF ACTION — TESTAMENTARY LIBEL. — A testator, leaving a small bequest to his niece, described her in the will as the illegitimate child of his brother. *Held*, that the niece may recover against the estate of the deceased in an action of libel. *Harris* v. *Nashville Trust Co.*, 162 S. W. 584 (Tenn.).

For discussion of the question thus raised, see page 666 of this issue.

ACCORD AND SATISFACTION — DISPUTED CLAIMS — RETENTION OF CHECK TENDERED AS PAYMENT IN FULL. — The defendant disputed one item in the plaintiff's claim for goods manufactured, but admitted the others, and sent a check for the admitted amount less two per cent. The check was stamped "This pays in full." The plaintiff cashed the check and sues for the balance of the account. *Held*, that the defendant is liable. *Dunn* v. *Lippard-Stewart Motor Car Co.*, 144 N. Y. Supp. 349 (Sup. Ct.).

The plaintiff sold and delivered to the defendant goods to the amount of $80.03. The defendant claimed the right to return part of these and sent a check for the price of the rest, stating that it was in full settlement of the account. The plaintiff refused to take the goods back, but cashed the check and sued for the balance of his claim. *Held*, that the defendant is liable. *Whittaker Chain Tread Co.* v. *Standard Auto Supply Co.*, 103 N. E. 695 (Mass.).

The plaintiffs leased an engine to the defendant. The defendant claimed a deduction from the rent because the engine was not in repair when leased, and sent a check for less than the amount of the rent in full settlement. The plaintiffs cashed the check and sued for the balance of his claim. *Held*, that the defendant is not liable. *Neubacher* v. *Perry*, 103 N. E. 805. (Ind. App. Ct.).

Where a check for less than the amount of a disputed or unliquidated claim is given on condition that it be accepted in full satisfaction, if the creditor cashes it, although protesting that it is in part payment only, the claim will be discharged, and the creditor will not be permitted to say that he has used the check in violation of the condition upon which it was given. *Nassoiy* v. *Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Sparks* v. *Spaulding Mfg. Co.*, 139 N. W. (Ia.) 1083. *Contra*, *Thayer* v. *Harbican*, 70 Wash. 278, 126 Pac. 625; *Day* v. *McLea*, 22 Q. B. D. 610. See *Hirachand Punamchand* v. *Temple*, [1911] 2 K. B. 330, 340, 342. The New York and Massachusetts cases represent an attempt to get away from this strict rule, which has been criticized as working a hardship on creditors. See 18 HARV. L. REV. 617. The theory of the courts is, that where part of a claim is admitted, payment only of that which is admitted can furnish no consideration for the discharge of the remainder. *Siegele* v. *Des Moines Mutual Hail Insurance Association*, 28 S. D. 142, 132 N. W. 697; *Thayer* v. *Harbican*, *supra*. But if the claim is entire, the debtor is not under two obligations, one certain and one uncertain, but under a single uncertain obligation. Therefore, the distinction taken by the courts seems unsound. *Treat* v. *Price*, 47 Neb. 875, 66 N. W. 834; *Neely* v. *Thompson*, 68 Kan. 193, 75 Pac. 117; *contra*, *Weidner* v. *Standard Life, etc. Co.*, 130 Wis. 10, 110 N. W. 246. To protect the creditor, however, the general rule should only apply where there is a *bonâ fide* dispute and where the tender is made upon a clear and unequivocal condition. *Canadian Fish Co.* v. *McShane*, 80 Neb. 551, 114 N. W. 594; *N. B. Borden & Co.* v. *Vinegar Bend Lumber Co.*, 62 So. 245 (Ala. Ct. App.).

BANKS AND BANKING — DEPOSITS — RIGHT TO APPLY DEPOSIT OF CONVERTED FUNDS TO ANTECEDENT DEBT OF DEPOSITOR. — W. was accustomed to ship hogs to his agent to sell, with instructions to deposit the proceeds with

the defendant bank to be applied to a debt W. owed the bank. By mistake, a consignment belonging to the plaintiff was sent on in W.'s name. The hogs were sold, and the agent, in ignorance of the plaintiff's ownership, deposited the proceeds as usual in the defendant bank, which the latter immediately applied to W.'s debt. The plaintiff, learning of the mistake, sues the bank. *Held*, that the plaintiff may recover. *Wilson* v. *Farmers' First Nat. Bank*, 162 S. W. 1047 (Mo. Ct. App.).

On the sale of the hogs the agent held the proceeds in constructive trust for the plaintiff. See *Newton* v. *Porter*, 69 N. Y. 133, 140. When the agent, acting for the principal, deposited the funds, by the agency doctrine of identification it was the principal who deposited. Now where a trustee deposits trust funds in his own general account, the bank may apply the money to any existing debt of his if it takes without notice of the trust. *School District* v. *Bank*, 102 Mass. 174. *First Nat. Bank* v. *City Nat. Bank*, 102 Mo. App. 357, 76 S. W. 489. But for the bank to have the right to apply, the relation of bank and depositor, of debtor and creditor, must exist. *Mingus* v. *Bank of Ethel*, 136 Mo. App. 407, 117 S. W. 683. In the principal case the agency was never revoked. So it would seem that in making the deposit the agent acted within his express authority, thus establishing the relation. See STORY, AGENCY, 9 ed., § 470. But even if the agent had no authority to deposit the fund, as the court seems to believe, or if he had been a complete stranger to the parties, it is submitted that the bank should still be protected. A contract of deposit is virtually a contract for the benefit of a third party. *Hawley* v. *Exchange, etc. Bank*, 97 Ia. 187, 66 N. W. 152. Where that doctrine is strictly followed, a new obligation arises at once in favor of the third party, *i. e.*, the promisor becomes the latter's debtor. *Bay* v. *Williams*, 112 Ill. 91. The relation of debtor and creditor thus established between the bank and W., the bank's right to apply would seem complete. *First Nat. Bank* v. *City Nat. Bank, supra.* Of course, where the third party's assent is required to fix the liability (*Wood* v. *Moriarty*, 15 R. I. 518, 9 Atl. 427), it would seem that the right should only accrue where assent is given. Or if the third party later disclaims, the bank's defense on this ground is gone. *Mingus* v. *Bank, supra.* But even so, the bank might be protected (on the broader doctrine of *Price* v. *Neal*, as set forth by Dean Ames in 4 HARV. L. REV. 297). It took the deposit under the *bonâ fide* impression that it was to the account of the debtor and so could rightfully be applied to his antecedent debt. The legal title passed, and, as the equities were equal, it is submitted that the bank should be allowed to retain. The principal case would therefore seem wrong.

BILLS AND NOTES — CHECKS — TRAVELERS' CHECKS — LIABILITY OF ISSUING BANK WHEN COUNTER-SIGNATURE IS FORGED. — The defendant bank had issued to the plaintiff a traveler's check in the following form: "When countersigned below with the opposite signature Knauth et al. through their correspondents will pay against this check out of their balance to the order of," etc. The check having been stolen, forged and paid, the plaintiff sued to recover his deposit. It appeared that there would have been ample time for the defendant bank to have prevented payment of the check had it been promptly notified of the loss. *Held*, that the plaintiff can recover. *Sullivan* v. *Knauth*, 50 N. Y. L. J. 2821 (N. Y. App. Div., March, 1914).

No previous case can be found which squarely involves travelers' checks. *Cf. Samberg* v. *Am. Express Co.*, 136 Mich. 639. It is submitted that in form this check represents a certification or acceptance in advance, which becomes effective by the addition of the drawer's counter-signature. When such a check is lost the likelihood of forgery is great, because it carries on its face a facsimile of the drawer's signature. On the other hand, payment at the direction of the forger could frequently be prevented by prompt notice to the issuing bank.